No. 75-1344

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In the Supreme Court of the United States

OCTOBER TERM, 1976

RICHARD A. SCARBOROUGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 1976. On February 26, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 19, 1976, and the petition was filed on March 17, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether proof that a firearm has previously traveled in interstate commerce may establish possession of a firearm "in commerce or affecting commerce," under 18 U.S.C. App. 1202(a).

2. Whether the seizure of firearms in petitioner's residence by state officers during a lawful search for narcotics pursuant to a search warrant violated the Fourth Amendment because a federal agent was present at the time of the search and received the firearms from the state officers.

STATUTE INVOLVED

18 U.S.C. App. 1202(a)(1) provides, in pertinent part:

> (a) Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony * * * and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of possessing in commerce or affecting commerce a firearm after having been convicted of a felony, in violation of 18 U.S.C. App. 1202(a). He was sentenced to one year's imprisonment. The court of appeals affirmed (Pet. App.).

1. In 1972, petitioner pleaded guilty in a Virginia state court to possession of narcotics with intent to distribute (S.T. 91, 97).[1] In August 1973, upon learning that petitioner was selling narcotics from his residence, state law enforcement officers obtained state warrants for petitioner's arrest and for a search of his residence for narcotics. They asked federal agent William Seals of the Bureau of Alcohol, Tobacco, and Firearms to be present during the arrest and search, since they suspected that petitioner was in possession of a firearm (Pet. App. 2a, n. 3).

[1]"S.T." refers to the separate, blue-covered transcript, containing part of the trial testimony; "Tr." refers to the main transcript, containing the testimony on the motion to suppress, as well as the remainder of the trial.

The state officers arrested petitioner and searched his residence. Agent Seals did not participate in the search (Tr. 7-12, 19-20, 33, 37, 102-102a, 109, 111-113). When, during the search, the state officers found four firearms in petitioner's bedroom,[2] they turned them over to Agent Seals for unloading (Tr. 11-12).[3] Agent Seals thereupon confiscated the firearms. It subsequently was determined that each firearm had traveled in interstate commerce prior to its possession by petitioner (Pet. App. 3a, n. 5; S.T. 52-71; Tr. 135-139).

Petitioner subsequently was charged with receipt and possession of the firearms after having been convicted of a felony. At trial, after the government had presented its evidence, the district court granted petitioner's motion for a judgment of acquittal on that portion of the indictment charging him with receipt, on the ground that the government had failed to produce any evidence of receipt of a firearm after petitioner had been convicted of a felony (Pet. App. 2a-3a). At the close of the trial, the court in-

[2]The search also elicited a hashish pipe, but no narcotics (Tr. 17, 35).

[3]Contrary to petitioner's assertion (Pet. 4), Agent Seals did not testify at the preliminary hearing that he found two of the firearms. Seals testified that after Officer James Phipps found the first two firearms, he gave them to Seals for unloading; while kneeling on the floor unloading the guns, Seals observed the second two firearms under the bed. Phipps, who saw them under the bed at about the same time, thereupon removed the firearms and gave them to Seals (Tr. 11-12, 23-25).

structed the jury on the offense of possession as follows (S.T. 158-159):

> The government may meet its burden of proving a connection between commerce and the possession of a firearm by a convicted felon if it is demonstrated that the firearm possessed by a convicted felon had previously traveled in interstate commerce.
>
> * * * * *
>
> It is not necessary that the government prove that the defendant purchased the gun in some state other than that where he was found with it or that he carried it across the state line, nor must the government prove who did purchase the gun.

DISCUSSION

1. Petitioner contends that the court of appeals erred in construing 18 U.S.C. App. 1202(a) to prohibit convicted felons from possessing firearms that previously traveled in interstate commerce but were not so moving at the time of the charged possession. Section 1202(a) prohibits convicted felons from "possess[ing] * * * in commerce or affecting commerce * * * any firearm." The possession of a firearm that previously traveled in interstate commerce has a sufficiently direct effect upon commerce to come within the ambit of the statute, as Congress indicated by finding that "possession * * * of a firearm by felons * * * constitutes * * * a burden on commerce or threat affecting the free flow of commerce" (18 U.S.C. App. 1201).

Had Congress intended to limit the statute to possessions that were contemporaneous with interstate travel, it presumably would have used language clearly accomplishing that effect, such as that it employed elsewhere in the Omnibus Crime Control and Safe Streets Act of 1968,

as amended, of which 18 U.S.C. App. 1202(a) is a part, to describe possession of a firearm "which is moving as, which is a part of, or which constitutes" interstate commerce (18 U.S.C. 922(j)). To construe the language of Section 1202 (a) to mean the same as that of Section 922(j), moreover, would permit convicted felons to retain in their possession any firearm they received prior to their conviction. Such a construction appears inconsistent with the broad purpose of the 1968 gun control legislation, which was to curb crime by "keep[ing] firearms out of the hands of those not legally entitled to possess them because of * * * criminal background" (S. Rep. No. 1501, 90th Cong., 2d. Sess. 22 (1968); see *Barrett* v. *United States,* No. 74-5566, decided January 13, 1976), and to assure that "[u]pon his conviction * * * every assassin, murderer, thief and burglar [would be denied] the right to possess a firearm * * *." 114 Cong. Rec. 14773 (1968). [4]

Petitioner relies upon a statement in *United States* v. *Bass*, 404 U.S. 336. There, after holding that the words "in commerce or affecting commerce" in the statute apply to "receiv[ing]" and "possess[ing]" and not just to "transport[ing]" firearms, a plurality of the Court went on to note how the government could meet its burden of proving a nexus with interstate commerce (404 U.S. at 350):

> The Government can obviously meet its burden in a variety of ways. We note only some of these. For example, a person "possesses . . . in commerce or affecting commerce" if at the time of the offense the gun was moving interstate or on an interstate facility, or if the possession affects commerce.

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[4]The limiting construction would also create grave problems of proof even when the receipt occurred after the conviction, since date of receipt will often be impossible to prove.

> Significantly broader in reach, however, is the offense of "receiv[ing] . . . in commerce or affecting commerce," for we conclude that the Government meets its burden here if it demonstrates that the firearm received has previously traveled in interstate commerce.

Petitioner asserts that because the government need only show that the firearm previously traveled in commerce to establish a receipt "in commerce or affecting commerce," and because the plurality deemed the offense of receipt "[s]ignificantly broader in reach" than the offense of possession, it follows that the government must show something more than that the firearm previously traveled in commerce to establish a possession "in commerce or affecting commerce."

As the court of appeals observed in the instant case, however, the plurality in *Bass* did not intend to fix definite criteria for establishing interstate nexus, and did not base its statement upon an analysis of the statute's language or legislative history, but attempted to "not[e] 'only some' " of the ways in which that burden might be met (Pet. App. 4a). Accordingly, its suggestion that receipt of a firearm "in commerce or affecting commerce" could be established by showing that the firearm previously traveled in interstate commerce did not preclude the government from establishing possession "in commerce or affecting commerce" by making the same showing. The Sixth Circuit has construed the statute in the same manner as the Fourth. See *United States* v. *Jones*, C.A. 6, No. 75-1817, decided March 30, 1976; *United States* v. *Bush*, 500 F. 2d 19 (C.A. 6); *United States* v. *Brown*, 472 F. 2d 1181 (C.A. 6).[5]

[5]Petitioner seeks to distinguish the Sixth Circuit cases (Pet. 9-10) on the ground that the defendants in those cases were charged with receipt as well as possession. Whatever weight that distinction has in a case like *Brown*, where the stipulated evidence apparently fixed the date of receipt as occurring after the felony conviction, it has no significance in a case like *Bush*, where there is no indication that receipt was proved except by the proof of possession itself. In any event, in *Jones* the defendant was charged only with possession, and the court explicitly held "that when a person is charged with possession of a firearm but not with receipt of it, proof that the firearm was manufactured outside the state in which the possession occurred is sufficient to support a finding that the possession was in or affected commerce." Slip op. 8-9. See also *United States* v. *Carter*, C.A. 6, No. 75-2215, decided April 28, 1976, petition for a writ of certiorari pending, No. 75-1882.

The construction of 18 U.S.C. App. 1202(a) by the Fourth and Sixth Circuits, however, is contrary to recent decisions of three other courts of appeals, which have read the plurality's statement in *Bass* to require a showing that possession of the firearm was contemporaneous with its interstate travel. *United States* v. *Bell*, 524 F. 2d 202 (C.A. 2); *United States* v. *Cassity*, 509 F. 2d 682 (C.A. 9); *United States* v. *Johnson*, C.A. 7, No. 75-1875, decided June 11, 1976. Cf. *United States* v. *Steeves*, 525 F. 2d 33, 38 (C.A. 8). Moreover, the question of the degree of interstate nexus that must be shown to establish possession is important to the administration of the gun control laws. Accordingly, we do not oppose the petition for a writ of certiorari with respect to the first question presented.

2. Petitioner also contends that the seizure of the firearms from his residence violated his Fourth Amendment rights because a federal agent accompanied the state officers during their execution of the state search warrant and received the firearms from the state officers. Petitioner does not claim that the state search for narcotics was a pretext for a search for firearms; he concedes (Pet. 12) that the state officers were lawfully at his residence. Nor is there any question that the state officers

lawfully could have seized the firearms during their search for narcotics and later have turned them over to the federal agent, had the federal agent not been present (*Coolidge* v. *New Hampshire*, 403 U.S. 443, 465-468; *Alderman* v. *United States*, 394 U.S. 165, 177 n. 10). There is no suggestion that the search by the state agents went beyond the scope of search authorized by the warrant.

Petitioner does contend that the firearms were discovered in a separate search and seizure, conducted by the federal agent who accompanied the state officers, and that the failure of the federal agent to obtain a separate federal warrant for the firearms rendered that search and seizure unreasonable. The evidence showed, however, that the federal agent did not undertake any search but merely received firearms that were discovered in plain view by one of the state officers while searching for narcotics. Moreover, even if the receipt and taking of the firearms by the federal agent were viewed as a seizure under the Fourth Amendment, it was not rendered unreasonable by the failure of the federal agent to procure a separate federal warrant. The state warrant sufficiently protected petitioner's Fourth Amendment rights. The seizure was no more intrusive because it was accomplished by a federal agent rather than by a state officer.[6]

Nor does this decision conflict with *United States* v. *Sanchez*, 509 F. 2d 886 (C.A. 6), which held that evidence seized by a federal agent who had accompanied state

[6] *Lustig* v. *United States*, 338 U.S. 74, and *Byars* v. *United States*, 273 U.S. 28, upon which petitioner relies, are inapposite. In those cases, the state searches which elicited evidence were unlawful. Accordingly, the court held that such evidence could not be used in a federal prosecution if federal agents participated in or originated the idea for the searches. By contrast, the state search in the instant case was lawful, and there was no suggestion that the federal agent originated the idea for the search or participated in it.

officers into the defendant's house pursuant to a lawful state search warrant could not be used in a federal prosecution. In *Sanchez*, the Sixth Circuit concluded that the Fourth Amendment had been violated not by the federal agent's mere presence during the search but by the agent's seizure of certain explosives without a warrant. 509 F. 2d at 890. Here, however, petitioner's firearms were observed in plain view and seized by *state* officers (see pp. 2-3, *supra*), who "ha[d] a right to be in the position to have that view * * *." *Harris* v. *United States*, 390 U.S. 234, 236. Since this evidence was validly obtained by the state officers, it could properly be delivered to the federal agent and used in a federal prosecution.[7]

[7] Moreover, in *Sanchez* the court repeatedly emphasized that the federal agent had had both probable cause to suspect that the explosives would be found and the opportunity to obtain a federal warrant (509 F. 2d at 888, n. 2, 889, 890), whereas there is no suggestion in this case that Agent Seals could have procured a warrant to search for the firearms (Pet. 11).

CONCLUSION

For the foregoing reasons, we do not oppose the petition for a writ of certiorari with respect to the first question presented. The petition should be denied with respect to the second question presented.

Respectfully submitted.

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